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No. [redacted] 34

Supreme Court of the United States

OCTOBER TERM, 1926.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, *et al.*, trading as Gebrueder Rochling,

Respondents.

REPLY BRIEF FOR PETITIONER

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York City.

GODFREY GOLDMARK,
GEORGE G. ERNST,
RALPH F. COLIN,
Of Counsel.

Supreme Court of the United States.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, et al., trading as GEBRUEDER ROCHLING,

Respondents.

REPLY BRIEF FOR PETITIONER.

As was foreseen in petitioner's original brief, the respondents' argument rests essentially upon two contentions. First, that the mere use of the words "for account of" must always have the same meaning as when those words are used in the ordinary form of restrictive endorsement, and second, that no evidence has been offered by the petitioner to show that those words in the present case have a different meaning.

1. The Respondents' First Argument.

On pages 6 through 17 of their brief the respondents carefully list and analyze a great number of cases, the doctrine of which is the undoubted and well settled law of this court, but which is totally inapplicable to the circumstances of the present case. The facts in the leading

case of *White* vs. *Miners National Bank* (1881) 102 U. S. 658, are representative of all of the cases relied on by the respondents and if the facts of that case are distinguished from those in the present one, all of the cases relied on by respondents, except perhaps *Treutel* vs. *Barandon,* to be considered later, under this first argument are likewise distinguishable.

All of those cases have to do with the *endorsement* of an instrument by the payee (A) to the order of a third party (B) for the account of the payee-endorser (A). On those facts the cases held that the endorsee (B) becomes merely the agent of the endorser to collect the instrument and that he acquires a mere power and does *not* acquire either legal or beneficial title to the instrument. As this court said in the very portion of its opinion in *White* vs. *Miners National Bank,* quoted and relied upon by the respondents at page 9 of their brief:

> "The plain meaning of it (the endorsement) is, that the acceptor of the draft is to pay to the indorsee, for the use of the indorser. The indorsee is to receive it on account of the indorser. *It does not purport to transfer the title of the paper* or the ownership of the money when received."

The respondents fail utterly to comprehend and dispose of the distinguishing feature in all of these cases relied on by them which distinction is not only impliedly recognized by this Court in that portion of its opinion in the *White* case already quoted, but is specifically recognized by the provisions of Secs. 66 and 67 of the New York Negotiable Instruments Law (quoted in full at pages 30 and 31 of petitioner's original brief), and by

such cases as *Hook* vs. *Pratt*, 78 N. Y., 371. *None* of these cases relied upon by respondents deal with an endorsement situation analogous to the situation here presented. Without considering at all the effect of the fact that *the present case does not deal at all with an endorsement*, but with an instrument made by the National City Bank (in the case of one check), payable to the order of Knauth, Nachod & Kuhne for the account of the respondents, the analogous endorsement situation would be a check payable to the National City Bank and endorsed by it to the order of Knauth, Nachod & Kuhne, not for its, the National City's Bank own account, but for the account of a third party, the respondents. Thus, in summary, all of these cases cited by respondents are cases where A endorses to B for the account of A, whereas the analogous endorsement situation to that raised by the present case is an endorsement by A to B for the account of *C*. In this last situation A does not constitute "the endorsee" (B), the agent of the endorser (as in the cases relied upon by the respondents and recognized by subdivision 2 of Sec. 66 of the New York Negotiable Instruments Law), but on the contrary A by endorsing "vests the *title* in the endorsee (B) in trust for or for the use of some other person (C)," a totally different result as is recognized by subdivision 3 of Section 66 of the Negotiable Instruments Law and by the cases such as *Hook* vs. *Pratt*, supra.

Thus, when the two New York banks in the present case drew their own Cashier's checks in favor of the bankrupts "for account of the respondents" the bankrupts did not become the mere agent of the New York

banks to collect the latter's own obligation from themselves but the bankrupts immediately acquired legal title to the checks. Whether the bankrupts also acquired beneficial title depended entirely upon the arrangement existing between them and respondents and was not in any wise affected by the acts or conduct of the two New York banks. The petitioner has already shown, it is believed, that as a matter of fact the arrangement between the bankrupts and the respondents was such that upon the bankrupts' receipt of the checks "for the account of respondents" complete legal and beneficial title immediately vested in the bankrupts and the respondents became merely the general creditors of the bankrupts for the total amount then standing to the credit of their account with the bankrupts.

The petitioner's contention is supported by the presumption which exists as a result of the decision of this court in *Burton* vs. *United States*, 196 U. S., 283, to the effect that title to checks deposited with the banker for the account of the depositor passes to the banker in the absence of a special agreement to the contrary. Not only have the respondents in the present case failed to show such a special agreement taking the present deposit without the field of the presumption, but the petitioner on the other hand has affirmatively supported that presumption by additional evidence, such as the fact that the amounts deposited were immediately credited to respondents and *bore interest from the date of their deposit*—which evidence is discussed later.

In the single case of *Treutel* vs. *Barandon* referred to by the respondents at page 19 of their brief, there

was an endorsement by A to the order of B for the account of C. On those facts, on the authority of *Hook* vs. *Pratt, supra,* and of the specific provisions of the Negotiable Instruments Law, the endorsee (B) would have taken legal title to the instrument and the question would simply remain open as to whether B also received beneficial title. In the *Treutel* case it appeared not only that there was no bank-depositor relationship between B and C and, accordingly, that no presumption of a debtor-creditor relationship existed, but it even appeared affirmatively that the relationship between De Roure & Co. (B) and Treutel (C) was that of principal and agent. Accordingly it was held that the agent could not dispose of the principal's property for his own use. If, on the other hand, it had appeared, as it does in the present case, that as between De Roure and Treutel the former was the beneficial owner, Treutel would not have been successful in recovering the instrument from De Roure's transferee, the defendant.

Dominant Facts Must Control.

The "dominant facts"* of the present situation should not be sacrificed on the [redacted] altar of the formula offered by the respondents and built on the line of cases of which *White* vs. *Miners National Bank* is typical. Those dominant facts which the respondents have wholly overlooked are that the parties here involved were all bankers; that the respondents desired a credit with the bankrupts on a day certain; that they obtained that credit upon the day which they desired it and had con-

Nat'l City Bank vs. *Hotchkiss* (1913), 231 U. S., 50.

tracted for; and that the only practicable banking method in which the transaction could have been consummated, and the credit established when desired, was by the method here employed. The purely formal steps taken to accomplish the result were simply the mechanics of the transaction. The mere fortuitous similarity of the language employed in effecting the desired result with the language employed under wholly different circumstances in the ordinary restrictive endorsement cases, relied on by respondents, should not override the underlying intention of the parties or produce a result wholly at variance with the dominant facts.

Finally, that the checks bore on their face the statement that they "were payable only through the New York Clearing House" cannot determine in what capacity the bankrupts received them. Whether received by them for collection or as complete beneficial owners, the notation quoted simply delayed the right to realize on the instruments and could not determine in which of the two capacities the checks were received. It cannot seriously be argued that beneficial title to a negotiable instrument, payable in the future, *can not* be acquired before its maturity.

2. The Respondents' Second Argument.

Nothing contained in respondents' brief affects petitioner's argument appearing at pages 18 to 23 of petitioner's original brief that the Record here contains affirmative evidence supporting the intention to create a debtor-creditor relationship and absolutely no evidence controverting the intention to create such a relationship.

The factual analysis of that evidence need not therefore be repeated here, but a brief consideration will be given to individual objections raised by respondents.

(A) Respondents contend, page 24, that if the London banks did not comply with their obligation to respondents to create a credit for respondents in New York on June 15, 1923, they still remained liable to the respondents. This fact is conceded, but its materiality is not understood. If any presumption is to be indulged in on the basis of that fact it should be the presumption that the London banks performed the obligations undertaken by them rather than that they failed to do so. The results contended for by petitioner would mean that the London banks had performed their obligation to respondents and that the New York banks in turn had performed their obligations to their London correspondents; that there had been established the credits which the respondents had bargained for; and that this had been done in the manner which had for years been employed. The respondents' contention, overlooking entirely the intention of the parties and resting wholly on the authority of the formula that "for account of, meaning one thing in one place, must mean the same thing in another" would lead to the unlikely result that the London and the New York banks in employing a regularly recognized banking practice were not performing their contractual obligations.

(B) Respondents point out, at page 26, that the Receiver, upon his qualification, reversed the credit which the bankrupts had given to the respondents on receipt by

them of a third $30,000 check from Speyer & Co., payment of which was stopped by the drawer. That fact cannot affect the capacity in which the bankrupts received the two checks here in question because, first, the act of the Receiver after the bankruptcy is no evidence of the intention of or arrangement between respondents and the bankrupts, and was made at a time when the Receiver could not even have ascertained what the prior dealings of the parties had been; and second, in any event the rights of the parties were by law fixed as of the date of the filing of the petition in bankruptcy and no act either of the Receiver or the respondents could thereafter change the existing relationship, whatever it was. *Everett* vs. *Judson* (1913), 228 U. S., 474.

(C) The respondents cite the cases of *National B. & D. Bank* vs. *Hubbell* (1889) 117 N. Y., 384, and *In re Jarmulowsky* (C. C. A. 2nd, 1918) 249 Fed., 319, in an attempt to avoid the almost inevitable conclusion that since the bankrupts allowed interest to the respondents on the amount of the checks from the date of their receipt, the title to the checks passed to the bankrupts and there resulted only a debtor-creditor relationship between the bankrupts and respondents. Neither the *Hubbell* or the *Jarmulowsky* cases are authorities in the present situation. While in the *Hubbell* case interest was allowed from the date of deposit and in the *Jarmulowsky* case the depositor was permitted to draw against his account from the date of deposit, there existed specific written agreements to the effect that the items were deposited with the bankers *for collection.* The court's statement of facts in the *Hubbell* case, as quoted by the respond-

ents themselves at page 29, clearly includes a finding that for a number of years the plaintiff there "had been accustomed to forward to the firm of Wilkinson & Co. for *collection* checks, drafts, and notes owing to the plaintiff * * *" In the *Jarmulowsky* case the pass book in the hands of the depositor contained the specific provision that "deposits of currency or coin may be drawn against after deposited, *but deposits of checks shall not be drawn against until collected.*" The holdings in those two cases, therefore, are simply to the effect that the payment of interest in the one case and the permission to the depositor to draw in the other were mere privileges granted by the banker and not rights to which the depositors were entitled. The respondents in attempting to use those authorities in the present case are arguing in a circle. They attempt to meet petitioner's showing that "for account of" does not always mean for collection—that in the present case the payment of interest indicates that despite the phrase "for account of" a debtor-creditor relationship existed—by showing that in cases where checks were admittedly deposited "for collection" the payment of interest did not change the legal relationship of the party. To the same effect is the case of *Fifth National Bank* vs. *Armstrong*, 40 Fed. 46, relied on by the respondents at page 35.

CONCLUSION.

The respondents have not even attempted to rebut the petitioner's argument that the essential facts in the present case indicate that the respondents bargained for a particular credit upon a particular day, in the transac-

tions involved in the present proceeding as well as in all prior transactions; that the credit was established; that they got what they bargained for; and that, accordingly, when the credit was established the legal and beneficial title to the checks passed to the bankrupts and that the respondents must take their place with the other general creditors in the ratable distribution of the bankrupts' estate. In order to gain a preferential position, the respondents have been compelled to argue that the parties with whom they contracted performed acts which amounted to a failure on their part to carry out their obligations although for at least two years prior to the bankruptcy the same practice had been pursued in similar situations to the knowledge of the respondents, without complaint. The underlying intention of the parties should not be buried beneath a cloak of phraseology.

Repsectfully submitted,

GODFREY GOLDMARK,
Counsel for Petitioner.

GODFREY GOLDMARK,
GEORGE G. ERNST,
RALPH F. COLIN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1[redacted] 3[redacted] 34

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, Petitioner,

against

KARL RÖCHLING ET AL., Trading as Gebrueder Röchling, Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HENRY G. HOTCHKISS, Esq.,
120 Broadway, New York City;
WILLIAM H. WHITE, Jr., Esq.,
Investment Building, Washington, D. C.,
Attorneys for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 1069.

MIDDLETON S. BORLAND, AS TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE, PETITIONER,

against

KARL RÖCHLING ET AL., TRADING AS GEBRUEDER RÖCHLING, RESPONDENTS.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The only possible ground on which the petition herein can rest is that portion of section 5-(*b*) of Rule 35 of the United States Supreme Court General Rules, which reads as follows:

> "Where a circuit court of appeals * * * has decided an important question of general law in a way probably untenable or in conflict with the weight of authority."

None of the other reasons set forth in these rules or reflected in the decisions exist herein. For instance, there is no conflict of authority between different circuit courts of appeal, nor between the Federal and State courts. Nor, indeed, does the petition attempt to suggest that the case comes under any rule other than the one quoted above.

Examination of the case and of the rule make it clear that by the very terms of the latter this petition should be denied.

There is no split of authority on the question at issue and none is suggested in the petition. All of the authorities are unanimous in supporting the decision of the circuit court of appeals.

The question at issue was settled over fifty years ago by the Supreme Court in the case of *White vs. Miners National Bank* (1881), 102 U. S., 658. That case held that the words *"for account of"* on negotiable paper were restrictive, or as stated by the court in the *Latzko & Popper case,* referred to in the petition. (The court's opinion appears herein as "Appendix 1.") When, therefore, in the case at bar it appeared that the decision hinged on the critical facts that the court was dealing with negotiable paper on which appeared the words *"for account of"* it was inevitable and right that the *White case* should have been followed as the controlling and determining authority.

The Decision of the Circuit Court of Appeals is Correct

The Circuit Court of Appeals in this case had to decide the following questions:

1. The applicability or non-applicability of the decision in the *White case* to the case at bar.

2. The difference, if any, between the facts in the case at bar and the facts in the case of *White vs. The Bank.*

The Circuit Court of Appeals decided that the *White case* was controlling and that on the facts presented here the decision should be the same. This decision was rendered by unanimous court, consisting of Circuit Judges Hough, Manton, and Learned Hand. (The court's opinion appears herein as "Appendix 2.")

But these essential questions had also been passed upon by the Circuit Court of Appeals in the case of *Latzko & Popper* referred to in the petition, which case is to be presented to the Supreme Court in an application for a writ of certiorari at the same time as the present application. There again the Circuit Court of Appeals had to pass on the following questions:

1. The applicability or non-applicability of the decision in the *White case* to the case at bar.

2. The difference, if any, between the facts in the case at bar and the facts in the case of *White vs. The Bank.*

The court, consisting of Circuit Judges Rogers, Manton, and Learned Hand, unanimously decided that the *White case* was controlling under the facts of the case at bar.

It thus appears that the very questions which are at the heart of this case have been fully and carefully considered by the Circuit Court of Appeals for the Second

Circuit on two separate occasions. This consideration has been given by four different judges. Two of the judges, Judges Manton and Learned Hand, sat on both cases, and two, Judges Rogers and Hough, took part in only one. All four of the circuit judges have unanimously concurred in the decisions reached by the court. Under these circumstances it cannot be said that the decision is untenable or "that it is in conflict with the weight of authority" and unless petitioner can bring it within these qualifications he admittedly is not entitled to the relief sought.

It is respectfully submitted that a writ of certiorari should be denied.

Respectfully submitted,

HENRY G. HOTCHKISS, Esq.,
Attorney for Respondents.

HENRY G. HOTCHKISS,
WILLIAM H. WHITE, Jr.,
Of Counsel.

APPENDIX 1.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, Herbert B. Smithers, John R. Hall, Mary W. Knauth, and Theodore W. Knauth, *Individually and as Copartners, Doing Business under the Firm Name and Style of Knauth, Nachod & Kuhne, Bankrupts;* Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper, and Emil Hochstein, *as Copartners, Doing Business under the Firm Name and Style of N. Latzko & A. Popper, Petitioners-Appellants;* Middleton S. Borland, *Trustee-Appellee.*

Before Rogers, Manton, and Hand, Circuit Judges.

Brodek & Raphael, for petitioners-appellants; Charles A. Brodek, Borris M. Komar, of counsel.

Rosenberg & Ball, for trustee-appellee; George C. Ernst, Ralph F. Colin, of counsel.

Kellogg, Emery, Inness-Brown & Cuthell; Henry G. Hotchkiss, of counsel, appearing as *amicus curiæ.*

This cause comes here from the United States District Court for the Southern District of New York.

The facts are stated in the opinion.

Rogers, *Circuit Judge:*

This is an appeal from an order dismissing a reclamation claim of copartners doing business as international bankers and maintaining a banking house in the city of Budapest, Hungary, under the firm name of N. Latzko & A. Popper. And on appeals in such a pro-

ceeding this court reviews both findings of fact and conclusions of law.

On June 15, 1923, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that the firm of Knauth, Nachod & Kuhne be adjudged bankrupt and they are hereinafter referred to as the bankrupts.

A temporary receiver was appointed anl qualified and the receivership was extended for each individual member of the copartnership, and the receiver entered into possession of the property of the alleged bankrupts.

The bankrupts were engaged in business as international bankers and maintained a banking-house in the city of New York. They acted as the New York correspondents of the Budapest banking house of N. Latzko & A. Popper, the petitioners.

The nature of the dealings between the two banking-houses involved the transmission of funds by the Budapast house to the New York house, or the delivery by the Budapest house to the New York house of evidences of debt which were collected by the latter and placed to the credit of the former, from which account payments were made from time to time by the New York house upon order or request of the Budapest house.

There was no express agreement that evidences of debt, so forwarded to the bankrupts, were to be credited upon their receipt and before collection as a deposit of cash. Neither was there an express agreement that upon the receipt of such evidences of debt by the New York house the Budapest house should have the right to draw against the fund prior to its collection. But there was no agreement that the Budapest firm could not draw against such evidences of debt before their collection. They simply did not as a matter of

fact do it. The allegations in the petition make this clear and are found in the margin.[1]

In the determination of the questions which are involved it is important to keep in mind the date on which the trustee of a bankrupt's estate becomes vested with the title to the estate.

Section 70*a* of the Bankruptcy Act provides that—

> "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * *."

And Remington on Bankruptcy (3rd Ed., volume 3, section 1191, states that the above section of the Bankruptcy Act vests all the property in the trustee, which prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

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[1] "Fifth. That petitioners had no agreement with said K., N. & K. (the bankrupts) to treat evidences of debt deposited with said K., N. & K. for collection or otherwise, as a deposit of cash, nor that an immediate credit should be given by said K., N. & K. to petitioners upon the receipt of such evidences of debt.

"Sixth. That petitioners did not treat evidences of debt deposited with said K., N. & K. for collection or otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K., N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K., N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K., N. & K."

In Everett *vs.* Judson, 288 U. S., 474, 479, the court said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition."

And this doctrine is reasserted in White *vs.* Stump, 266 U. S., 310, 313. In the case last cited, referring to the date when the petition is filed, the court said:

> "The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt.' "

The petition for reclamation in this case alleged that the involuntary petition in bankruptcy was filed on June 15, 1923, at 10.30 p. m. with the district judge, and that on the same day the temporary receiver was appointed, and that on June 16th he duly qualified, filed his official bond and entered into possession of the property of the alleged bankrupts. It then alleges that on June 16, 1923, at 9.30 a. m., the involuntary petition in bankruptcy was duly filed in the office of the clerk of the district court. The receiver filed an answer to the petition in which he denied various allegations contained therein, but he did not deny the allegation that the petition in bankruptcy was filed in the clerk's office on June 16, 1923, at 9.30 a. m.

At the hearing on the reclamation petition before the special master the attorneys for the claimant and those for the trustee for the bankrupts stipulated certain matters and "agreed that throughout the petition the reference to 'the day said petition in bankruptcy

was filed against said K., N. & K.' or any similar allegation, shall mean only 'June 15, 1923' (this refers particularly to paragraphs eight, ninth, tenth, eleventh and thirteenth)."

The paragraphs thus referred to are those which contain the allegations as to the time when the three checks herein involved were delivered, credited and collected and that when the petitioners caused the checks to be delivered to the bankrupts for collection and deposited to the petitioners' account they did not know of the bankrupts' insolvency, and also that when they caused the checks to be delivered to the bankrupts they had a credit balance with the said bankrupts amounting to several thousand dollars and were not then and have not been at any time since indebted to the bankrupts or to the receiver.

This stipulation as to the meaning of "the day said petition in bankruptcy was filed" cannot have the effect of a determination binding upon this Court upon the question of the time when the petition was legally filed so as to determine the rights of the parties as affected thereby. Neither do we understand that the parties meant anything more than that the court should understand that the allegations in so far as they refer to the occurrence of an act on the day when the petition was filed the allegation referred to June 15, 1923. And we hold that the petition was filed not on June 15th, when it was presented at 10.30 p. m. to the district judge, but on June 16, at 9.30 a. m., when it was filed in the clerk's office.

The word "filed" has not been defined by Congress. It has, however, a well-defined meaning. It signifies the delivery into the actual custody of the proper officer, designated by the statute, and whose duty it is to keep the records of the court. It carries with it the idea of permanent preservation of the thing as a public record. A paper is not filed by presenting it to the

judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court for the purpose of making it a part of the records of the case. See United States *vs.* Lombardo, 241 U. S., 73, 76; Laser Grain Co. *vs.* United States, 250 Fed., 820, 831; Emmons *vs.* Marbelite Plaster Co., 193 Fed., 181; *In re* Von Borcke, 94 Fed., 352.

In the case under consideration the claim is based upon threee checks:

1. A cashier's check of the Irving Bank-Columbia Trust Company, dated June 14, 1923, for $3,000.
2. A cashier's check of the National City Bank of New York, dated June 15, 1923, for $1,294.
3. A check of Goldman, Sachs & Co., dated June 15, 1923, drawn on the Bank of America for $15,000.

We shall consider them in the order named.

THE THREE THOUSAND DOLLAR CHECK.—This check may be found in the margin.[1] The check did not indicate on its face that it was for the account of the petitioners. But the bankrupts on June 14th, the day the check was dated and the day on which the bankrupts received it, gave to the Irving Bank-Columbia Trust

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[1] "*Treasurer's Check.*

"NEW YORK, 6/14/23. No. K10217.

"Irving Bank-Columbia Trust Company,

Woolworth Building.

"Pay to the order of Knauth, Nachod & Kuhne, New York City, $3,000.00 Three Thousand and 00/100—Not over Three Thousand ($3,000) Dollars through New York Clearing House.

"G. W. BUGEL,
"Treasurer."

"Countersigned:
"F. J. MORAN.

Company a receipt in which they stated the check was received "for account of N. Latzko & A. Popper, Budapest." The special master held this indicated that the bankrupts undertook to collect the check as an agent for Latzko and Popper. He held that the proceeds, when collected, would have been the property of the Budapest house were it not for the allegation in the petition that the *petitioners caused* the Irving Bank-Columbia Trust Company, who drew the check, to deposit it for the account of the petitioners with the bankrupts. He thought therefore that when the check was so deposited and credited and collected all prior to the filing of the petition in bankruptcy, the bankrupts had become debtors to the petitioners, and the proceeds of the check amounted to a debt due from the bankrupts to them.

This check was credited by the bankrupts to the claimant's account on June 14, 1923, the day before the petition in bankruptcy was presented. And on the same day that the bankrupts credited the check to the claimant's account they indorsed the check to the American Exchange National Bank, and that bank on the same day credited the bankrupts with the amount of the check. The check was collected by the American Exchange National Bank through the New York clearing-house on June 15, 1923. This was the day the petition in bankruptcy was presented to the district judge, though prior to the filing of the petition.

The district judge in his opinion confirming the special master's report, states that this check wae collected the day the petition in bankruptcy was filed, and then goes on to say:

> "The proceeds of the first check clearly became part of the assets of the bankrupts prior to the hour when the petition was filed. I can see no reason for invoking the rule that the law will

take no account of the fractions of a day to defeat the bankrupts' title. It would be as tenable to hold that two *lis pendens* filed at different hours on the same day imposed an identical lien. The claimant cannot prevail as to the first check and the master's report as to it should be confirmed."

We fully agree that the law will take no account of the fractions of a day to defeat the bankrupts' title. It is true that for some purposes fractions of a day are not recognized in law. Louisville *vs.* Portsmouth Savings Bank, 104 U. S., 469; McGill *vs.* United States Bank, 12 Wheat., 511. But the rule that a day is an indivisible period of time is a mere legal fiction, which is subject to numerous exceptions. And one of them is that the courts will disregard the fiction as where it is necessary to protect a completed act or save a vested right, or to determine the conflicting rights of rival claimants when they depend upon priority in fact. Johnson *vs.* Smith, 2 Burr, 950; Cincinnati First National Bank *vs.* Burkhardt, 100 U. S., 686; Westbrook Mfg. Co. *vs.* Grant, 60 Me., 88; Hoyt *vs.* San Francisco, &c., R. Co., 87 Cal., 610; Jackson Brewing Co. *vs.* Wagner, 117 La. Ann., 875; Johnson *vs.* Pennington, 15 N. J. L., 188; Brainard *vs.* Bushnell, 11 Conn., 16; Neale *vs.* Utz, 75 Va., 480.

But we do not agree with the district judge as respects this check that it was actually paid on the morning of June 15th and prior to the filing on the same day, but at a later hour, of the petition in bankruptcy. That petition, for reasons already stated, was not "filed" on June 15th when it was presented to the district judge but on June 16th when it was deposited in the clerk's office. Inasmuch as prior to that time the amount of the check had been credited to the petitioners in their account with the bankrupts, and to the bankrupts in

their account with the American Exchange National Bank, the amount of the check had been actually collected. The bankrupts accordingly had become debtors to the petitioners prior to the filing of the petition in bankruptcy and the amount of the check was a part of the estate which on June 16, 1923, passed to the receiver of the estate of the bankrupts.

But there is another reason for reaching the same conclusion. The deposit of this check with the bankrupts, who were conducting a banking business, although made by the Irving Bank-Columbia Trust Company, was made by it as the agent of the petitioners and deposited under their instructions. It was, therefore, in effect as though deposited by the petitioners themselves. If it had been in fact deposited by them to be credited in their account, and the bankrupts indorsed it and credited it in their account the bankrupts, when so crediting it, would have made themselves at that time debtors in that amount to the petitioners, as no agreement is shown that the petitioners had no right to draw on checks deposited to their credit in their regular checking account until collection was actually made.

In Foley *vs.* Hill, 2 Cl. & Fin., 28, in the House of Lords, the effect of a deposit in a bank was fully discussed by Lords Cottenham, Brougham and Lyndhurst. They concurred in the opinion that the relation between a banker and customer, who pays money into a bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor. And in Bank of the Republic *vs.* Millard, 10 Wall., 152, 155, the supreme court, in 1869, declared:

> "It is no longer an open question in this court, since the decision in the cases of The Marine Bank *vs.* The Fulton Bank, 2 Wall., 252, and of

> Thompson *vs.* Riggs, 5 Wall., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor."

In St. Louis & S. F. Ry. Co. *vs.* Johnston, 27 Fed., 243A, who had an account in a bank in New York, deposited in the bank a sight draft drawn by him on a corporation in Boston. The bank credited him with the amount of the draft as a cash deposit. The bank was insolvent at the time but it forwarded the draft to its collection agent at Boston and it was paid after the bank had failed and closed its doors. Judge Wallace, sitting in the Circuit Court for the Southern District of New York, held that the draft was not the property of A when paid by the drawee and that he was not entitled to recover the amount thereof from the receiver. He said:

> "When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper."

In Burton *vs.* United States, 196 U. S., 283, certain checks on a bank in St. Louis were sent from that city to the payee, in Washington. The payee, on receiving them, indorsed them and deposited them in a bank in Washington, and were immediately credited in the payee's account. The checks were afterwards paid in due course by the St. Louis bank. The court held that the Washington bank acquired the title to the checks

when the deposit was made and credited in the depositor's account. The court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing

> any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank (the bank of deposit) was its owner when sent."

The trial judge in the Burton case had instructed that the effect of the deposit of the checks in the Washington bank depended upon the understanding and intent of the bank and the depositor. That if the intent and understanding was that the bank should become the purchaser of the check and be the absolute owner thereof, then the payment to the Washington bank amounted in law to a payment to that bank and not to the depositor. But if the intent and understanding of the bank and the depositor was that the Washington bank should act as the agent of the depositor, then the payment in St. Louis was in law a payment to the depositor. The supreme court held this was error, and that there was no foundation for submitting to the jury the question as to what the understanding of the parties was at the time the deposit was made. And this it held because the uncontradicted evidence showed that there was no agreement or understanding of any kind other than such as the law makes from the transaction detailed.

This court in *In re* Ruskay, 5 Fed. (2d), 143, 149, stated that where a check or draft is indorsed and deposited in a bank and is accepted as cash, it at once becomes the property of the bank and the bank becomes the debtor of the depositor in the amount of the check

so deposited, with the superadded obligation that the money is to be paid when demanded by check. In the absence of special agreement to the contrary, or some notice to the contrary given to the depositor prior to or at the time of the deposit, such is the rule as to the effect of the transaction.

The New York Court of Appeals in Craigie *vs.* Hadley, 99 N. Y., 133, laid down the law as follows:

> "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

The general rule is undoubted that checks deposited in a bank for collection remain the property of the depositor. Clark Sparks & Sons Mule, &c., Co. *vs.* Americus National Bank, 230 Fed., 738; Richardson *vs.* New Orleans Coffee Co., 102 Fed., 785; Philadelphia *vs.* Eckels, 98 Fed., 485; Fifth National Bank *vs.* Armstrong, 40 Fed., 46; Blair *vs.* Hill, 165 N. Y., 672; Perth Amboy Gas Light Co. *vs.* Middlesex County Bank, 60

N. J. Eq., 84; South Park Fidelity, &c., Co. *vs.* Chicago, Great Western R. Co., 75 Minn., 186.

In 7 *C. J.*, 599, the law is stated as follows:

> "One depositing paper in a bank may part with his title at the time of such deposit by a special agreement *or by an indorsement in blank;* and the general rule is that, where such paper is indorsed in blank, the first bank or any other bank through which it may pass, indorsed in the same manner, acquires a legal title * * *."

It is our opinion that when the bankrupts received this check payable to their order without restriction and credited it in the petitioners' checking account, the relation of debtor and creditor was thereby established on June 14, 1923. If not established then, there can be no question but that it was established on June 15th, when the check was collected. And as the petition in bankruptcy was not filed until June 16th there can be no doubt that the receiver in bankruptcy, and not the petitioners, was entitled to the proceeds of the $3,000 check.

THE TWELVE HUNDRED AND NINETY-FOUR DOLLAR CHECK.—This check may be found in the margin.[1]

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[1] "*Cashier's Check.*

"NEW YORK, *June* 15, 1923.

"The National City Bank of New York pay to the order of Knauth, Nachod & Kuhne, New York—$1,294.00—favor N. Latzko & A. Popper, Budapest—one thousand two hundred ninety-four and 00/100 dollars.

"Payable only through New York Clearing House.

"N. G. LENFESTEY,
"Cashier."

"J. W. ALLALE,
"Asst. Cashier."

"No. F. T. 261,365."

The petitioners alleged in their petition that on June 15, 1923, they caused the National City Bank of New York to deliver to the bankrupts this check to be collected for the account of the petitioners, and that it was to be so collected appears on the face of the check itself. For the words "Favor N. Latzko and A. Popper, Budapest" seems to us, on the whole, not to differ in effect from "Collect for N. Latzko and A. Popper, Budapest." A check so drawn cannot be said to be freely negotiable. Any payee to whom it was indorsed would take the proceeds when collected not for himself but for N. Latzko and A. Popper.

The bankrupts received the check on June 15, and on the same day they indorsed it in the manner disclosed in the margin.[1]

An examination of the check and the indorsement thereon disclosed to the American Exchange National Bank that it did not thereby acquire title to the check and that the proceeds did not belong to it or to the indorsers but to N. Latzko and A. Popper. The nature of the transaction was not affected by the fact that the bankrupts when they received the check credited it, on June 15th, in the account of the petitioners, or that the subsequent indorsee, the American Exchange National Bank, when they received the check on June 15th, at once credited it in the account of the bankrupts. The bank did not receive the proceeds until June 16, and when they received it it was not as their money and not as the money of the bankrupts, but as the money of N. Latzko and A. Popper, the petitioners herein. The right of the petitioners to the proceeds of the check is not to be defeated by the fact that the bankrupts credited it in the petitioners' account before it was collected, or by the fact that the American Exchange Bank

[1] "Pay to American Exchange National Bank or order. June 15, 1923. Knauth, Nachod & Kuhne, New York, N. Y. 1-548. 1-548."

credited it in the indorser's account. They might do so at their own risk, but not at the risk of the petitioners. The proceeds of the check, whenever it was collected, belonged to N. Latzko and A. Popper. And nothing the bankrupts could do prior to its collection could deprive them of their right to the fund.

In 1860, in Lee *vs.* Chillicothe Branch of State Bank, 15 Fed. Cas., 151, case No. 8187, Mr. Justice McLean (of the supreme court), sitting as circuit justice, had before him bills drawn by certain persons at Chillicothe, Ohio, on Edwin Ludlow, of New York, as cashier of the Ohio Life Insurance and Trust Company, payable to the order of the defendant, indorsed, "Credit my account. James B. Scott, Cashier." The indorsement was held to be restrictive and put an end to the negotiability of the bill. It was an appropriation of the proceeds of the note which rendered any other appropriation of them illegal. It was said that if a bill be restrictively indorsed a subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. "He is a mere agent and trustee for his principal, and whoever takes the money holds it under a similar trust."

In Bank of the Metropolis *vs.* First National Bank of Jersey City, 19 Fed., 301, in the Circuit Court for the Southern District of New York, the plaintiff sent the checks to the Mechanics' National Bank of Newark for collection, with the qualified endorsement: "For collection; pay to the order of C. L. Baldwin, cashier." The Newark bank sent the checks for collection to the defendant. After the defendant received the checks the Newark Bank became insolvent. Judge Wallace held that the indorsement by plaintiff "for collection" was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds to

another. He said, "As was held in Cecil Bank *vs.* Bank of Maryland, 22 Md., 147, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection."

In re Jarmulowsky, 249 Fed., 319, a depositor indorsed checks in blank and received credit for the same in his passbook. The book contained a notice that "deposits of check shall not be drawn against until collected." These checks were redeposited to their own account in other banks and were in due time collected, but collection had not been made when the receiver in bankruptcy took possession of the banking-house in which the original deposits were made. This Court held that in the absence of the special agreement between the depositor and the bank the title to the checks would have passed to the bank, and the bank would have become merely a debtor to the depositor for the amount entered in the passbook. The question presented was whether a depositor who is credited with the face of checks which he has agreed not to draw against until they shall been collected, has by the act of deposit parted with the title to the checks so deposited. Under the circumstances stated, this Court thought that the course of business shown created the relation of principal and agent and was in effect the same as though the checks had been indorsed "For collection and deposit to the account of the depositors." The court pointed out that if prior to the bankruptcy proceeding the agency had been fulfilled by collection of the checks, the moment the bank got the money on the checks the relation of debtor and creditor would have arisen.

In White *vs.* Miners' National Bank, 102 U. S., 658, a draft was indorsed "Pay to A or order for account of B." The court held that by the terms of the indorsement A became merely the agent of B for the collection

of the money. The plaintiff relief on two propositions. The first of these is that words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted. The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract. Mr. Justice Miller writing for the court, after stating the two propositions on which the plaintiff relied, said:

> "We are not satisfied that either of these propositions is sound.
>
> "The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.
>
> "If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it.

> "But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did."

The legal effect of the transaction was merely to enable White to collect the money for the bank, and it was held that where A, the payee of a check, indorses it to B "for account of A" B does not get title to the check, but is merely the agent to collect it for A's benefit. It is our understanding that if A deposits a check in a bank in which he has a checking account, and endorses it for his account, and the bank credits it to his account, the title to the check passes to the bank and it becomes a debtor to the depositor for the amount thereof.

At the argument emphasis was placed upon the allegation made by petitioners in their petition that they caused this check to be delivered by the National City Bank to the bankrupts, and we were told that the effect of the transaction must therefore be the same as though this check had been brought in by the petitioners. And that if the petitioners had brought it in and the bankrupts had at once placed it to the credit of the petitioners the relation of debtor and creditor would then and there have been established between them. It may be true that if petitioners had presented the check for collection and it was agreed between them and the bankrupts that it was to be credited before collection, such would have the effect of the transaction. But there was no such agreement made between them or on their behalf.

It is our opinion that the words on this check, "Favor N. Latzko and A. Popper, Budapest," restricted the

payee's power over the check. The words were equivalent to an indorsement for collection. A check made payable to a payee in favor of another is not freely negotiable and the payee holds it as an agent until he has collected and credited it. As this check was not collected until June 16, 1923, "during banking hours," we think the money collected on the check was the property of the petitioners at the time the petition in bankruptcy was filed on the morning of that day at 9.30 a. m. and therefore did not pass to the receiver in bankruptcy.

THE FIFTEEN THOUSAND DOLLAR CHECK.—This check may be found in the margin.[1]

The petitioners alleged in their petition that on June 15, 1923, they caused Goldman, Sachs and Company to deliver to the bankrupts this check "to be collected" by the latter for the account of the petitioners. This allegation was in terms similar to that made respecting the $1,274 check above considered. But the check which was introduced in evidence differs from that check in that it does not disclose that it was to be collected for the petitioners.

At the time this check was delivered to the bankrupts they accompanied it with a letter explaining that

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[1] "Goldman, Sachs & Co.

"No. 69619. NEW YORK, *Jun.* 15, 1923.

"The Bank of America pay to the order of Knauth, Nachod & Kuhne $15,000, fifteen thousand dollars.

"J. M. HUMPHREY."

"Passed. F. W. Y."

it was for account of petitioners. The letter is in the margin.[1]

On receipt of the check, on June 15th, the day prior to the filing of the petition in bankruptcy, the bankrupts credited it to the account of the petitioners. They on the same day indorsed the check "Pay to American Exchange National Bank or order," and delivered it to that bank. And that bank also on the same day credited the bankrupts with the amount of the check in the bankrupts' account. But the check was not actually collected until the following day "during banking hours." The petitioners state in their petition that this collection was made after the petition in bankruptcy was filed, but as they also allege that the petition was filed on June 15th, and the facts show that it was not filed until June 16th, we do not know whether collection was actually made before or after the filing of the petition. And in the view we take of the matter it is unimportant whether collection was made on June 16th, prior to the hour when the petition in bankruptcy was filed, or on a later hour on the same day.

The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn,

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[1] "NEW YORK, *June* 15, 1923.

"Knauth, Nachod & Kuhne, New York:

"We hand you herewith our check for fifteen thousand dollars for account of Latzkopper, Budapest, by order of Julius Baer & Co., Zurich, as per cable, June 15, from same.

"Please sign the attached receipt and return to bearer.

"$15,000.00. GOLDMAN, SACHS & CO."

that it was to be placed in the account of the petitioners. This they did as the agents of the petitioners. The legal effect of the transaction was the same as though the petitioners had themselves deposited the check "for our account" with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. That transaction made the American Exchange National Bank the owner of the check on June 15th and the proceeds when collected on June 16th belonged not to the petitioners or to the bankrupts but to the bank, which was the owner of the check when it was collected. We think the transaction is governed by the rule laid down in the Burton case, and that the relation between the petitioners and the bankrupts on June 15th, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners. The finding of the court below, as to this check, was not erroneous.

The authorities cited in what we have said respecting the check for $3,000 are equally applicable to this check for $15,000.

Before concluding this opinion we may remark that while the petitioners alleged in their petition that at the time the bankrupts accepted the checks and deposited them they knew full well that they were insolvent and unable to meet their obligations, and that they knew of the preparation of the original involuntary petition in bankruptcy filed against them.

It was also alleged that at the time the checks were delivered to them the bankrupts wrongfully, fraudulently and with intent to defraud the petitioners held

themselves out as a solvent and solid banking-house, whereas they were insolvent and unable to pay their debts.

The answer interposed by the trustee denied any knowledge or information sufficient to form a belief as to the allegation. This was not an admission of the truth of the petitioners' allegation and was sufficient to put the petitioners to their proof. 1 Encyc. of Pl. & Pr., 947; Federal Equity Practice, vol. 1, sec. 726.

If the bankrupts knew they were hopelessly insolvent and could not go on when they received the checks, and credited the same in the accounts of the petitioners, they acted fraudulently in doing what they did and the petitioners would be entitled to rescind the transactions involved and the bankrupts would hold as trustees *ex maleficio* subject to the petitioners' right of reclamation. St. Louis & San Francisco Railway Company *vs.* Johnston, 133 U. S., 566. The mere fact of insolvency is not enough. The insolvency must be of such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations and that fact must have been known to them when they accepted the deposits. Fidelity & Deposit Co. *vs.* Kelso State Bank, 287 Fed., 827, 830; Quin *vs.* Earle, 95 Fed., 728. But the burden was on the petitioners to show these facts and this they have not done. The record does not disclose that any evidence was introduced before the special master in support of the allegations that the bankrupts knew they were insolvent and could not go on when they received the checks and credited them in the petitioners' account.

The decree is affirmed as to the checks for $3,000 and $15,000, and is reversed as to the check for $1,294.

APPENDIX 2.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In re OSCAR L. GUBELMAN ET AL., *Bankrupts; Ex Parte* KARL RÖCHLING *et al., Appellants,* MIDDLETON S. BORLAND, *Trustee, Appellee.*

Before Hough, Manton, and Hand, Circuit Judges.

Appeal from an order in bankruptcy of the District Court for the Southern District of New York dismissing the petition or the firm Gebrueder Röchling to reclaim the proceeds of two cheques which came into the possession of the trustee in bankruptcy.

Henry G. Hotchkiss, for the appellants.
George G. Ernst, for the appellee.

HAND, *Circuit Judge:*

This case presents exactly the same situation, with a single exception to be noted, as existed in respect of the second cheque in *In re* Gubelman, *ex parte* Latzko & Popper, decided by this Court on December 7, 1925. There the cheque read: "Pay to the order of Knauth, Nachod & Kuhne, favor of N. Latzko & Popper." Here one cheque read: "For account of Röchling Bank," and the other, "% Gebt. Röchling." We held that "Favor of" was equivalent to "collect for," and it seems to us even plainer that "for account of" is as broad. Indeed this was the form of the cheque in White *v.* National Bank, 102 U. S., 658. If the drawer chooses to make the payee a fiduciary he establishes that relation when the payee accepts it, at least until

the beneficiary repudiates it, or unless his arrangements with the payee forbid. There can be no question that the drawer has limited the payee's free disposal of the cheque in the interest of another, and that is enough.

However, as we have just said, there is one difference between the case at bar and *ex parte* Latzko & Popper. There the proof was that although the depositors' cheques were always at once credited to their account, their practice had been never to draw upon them until collection. Here the cheques were also credited at once, but it does not appear what the practice was as to drawing against them. As there was no agreement shown in either case to wait or not to wait until collection we regard any distinction as immaterial. In addition, not only were the items themselves at once credited, but interest upon them as well from the time of their receipt. This too we think immaterial. The immediate credit of such paper is itself evidence of the creation of a debt from the bank to its depositor, and on its face presupposes a purchase of the cheque. But such an entry will not control the form of the paper. We do not see that it adds anything of substance that interest has also been credited. Such entries are not kept in suspense or entered "short," but are reversed, if the item be dishonored. The trustee must indeed go so far, and does, as to say that if these cheques had been stopped, the claimants could notwithstanding have insisted upon drawing down their amount, because they were not endorsers. Yet this could not have been done if their face had been merely credited to the account. It appears to us that to make the added credit of interest so important is to deal in unrealities. When an account bears interest it is as natural to begin to credit interest at once as to credit the item at all. Any distinction seems to us gratuitous.

The cases do not help very much. In Beal *v.* Somer-

ville, 50 Fed. Rep., 647 (C. C. A. 1), no interest was credited, nor was there an agreement that the depositor might draw at once. In First National Bank *v.* Armstrong, 40 Fed. Rep., 46, interest was indeed credited, but the credit was entered "subject to payment." National Butchers Bank *v.* Hubbel, 117 N. Y., 384, is closer, because although the bank did not credit interest, it remitted weekly, regardless of collections, relying upon its ability to reverse the entries, if any item were dishonored. That seems a stronger case for the assignee than this at bar is for the trustee.

In general we are disposed to make the form of the paper the test. We do not of course mean that an express agreement will not change what would otherwise be a trust into a debt. But it seems to us unreasonable to build up agreements, almost certainly factitious, upon the basis of the bank's book-keeping, even when this on its face contradicts the legal results ascribed to the transactions. There must be better evidence of an agreement to change the intent otherwise imputed.

Order reversed; cause remanded with instruction to award the claimant a preferred claim on both cheques.